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WHAT IS THE LIABILITY OF INDIVIDUALS AND MUNICIPAL CORPORATIONS FOR OBSTRUCTING THE FLOW OF SURFACE WATER?

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A comprehensive definition of surface water is given in 24 Am. and Eng. Ency. of Law, 896 (1st Ed.): "Surface waters are waters of a casual and vagrant character, which ooze through the soil, or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no bounds or channels in the soil."

The liability for obstructing or preventing the flow of waters of this character is a question of constant and recurring and conflicting judicial investigation and determination. Practically all of the states of the Union have put themselves on the sides of two opposite holdings. These two doctrines are known respectively as the civil law rule and the common law rule.

As this argument is toward the common law rule, the views of the civil law on the subject, for the sake of brevity, will be treated at short length. In brief, the civil law holds that the lower estate is subject to the servitude or easement of receiving the flow of surface water from the upper or adjacent estate, without hindrance or obstruction. The proprietor of the lower estate is liable if he so uses his land as to hinder the flow or throw back surface waters on the land of the upper proprietor, or one in whose favor the servitude exists. This doctrine finds favor in Alabama, Colorado, Georgia, Illinios, Iowa, California and Louisiana, and probably prevails in Kentucky, Indiana, Nevada, Ohio and Pennsyl-

vania. For thorough discussion, see *O'Connell* v. *East Tenn. Ry. Co.*, 87 Ga. 247; *Sullens* v. *Chicago etc. R. R. Co.*, 74 Iowa 659, 7 Am. St. Rep. 501; *Montgomery* v. *Locke* (Cal.), 11 Pac. 874.

The common law rule holds that surface water is a common enemy, the flow of which may be in any manner diverted, hindered, obstructed or prevented when it becomes necessary to protect an estate from probable damage or injurious invasion. Under this holding, no servitude attaches to the lower or adjacent proprietor; and he may receive or repel the flow of surface water. This view obtains in Connecticut, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New York, New Jersey, Texas, Wisconsin, South Carolina and Virginia, and probably other states.

Each of these two doctrines is based upon a well recognized legal maxim. The civil law rule considers as its foundation, *sic utere tuo ut alienum non laedas.* The common law rule follows the maxim, *cujus est solum, ejus est usque ad caelum.* The sanction or reasonableness of these principles in support of the two different views will be considered further.

The common law doctrine is believed to have originated in the case of *Gannon* v. *Hargadon* (Mass.), 10 Allen 106, 87 Am. Dec. 625. In this case the court said: "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water which may accumulate thereon by rains and snows falling upon its surface, or flowing on it over the surface of adjacent lands, to pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . Nor is it at all material, in the application of this principle of the law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries." Following this case, which was decided in 1865, the courts of many states have adopted a similar doctrine. In the case of *Peck* v. *Good-*

berlett (N. Y.), 16 N. E. 350, it is said: "One who in the ordinary course of husbandry, causes surface water to flow on the land of an adjoining owner with slightly increased velocity, without increasing the volume, or diverting the flow from its natural course, or causing material injury to the adjoining owner, commits no wrong." The common law rule is followed in Minnesota in the case of *Rowe* v. *St. Paul etc. Ry. Co.*, 43 N. W. 76. In the case of, *Chadeayne* v. *Robinson* (Conn.), 11 Atl. 592, the defendant erected a tight board fence between his lot and that of plaintiff's, whereby the surface water from plaintiff's lot was stopped from flowing on the defendant's lot. *Held*, that the defendant had a right to erect a perfect barrier to the flow of the surface water. An interesting discussion of the reasonableness and soundness of this doctrine is found in the case *Gibbs* v. *Williams* (Kan.), 37 Am. Rep. 241; where it is said: "The wisdom of this doctrine will be apparent to all men on a little reflection. If the right to run in its natural channel was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle it would be impossible to enforce the right in its vigor; for it is obvious that every house that is built, every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a water-shed and most low ground would become reservoirs. It is certain that any other doctrine would be impracticable."

Private corporations are subjected to the same liability as individuals, except when the rule is changed in respect to them by special enactments or charter provisions. In *Yazoo etc. Co.* v. *Davis* (Miss.), 19 So. 487, it is said: "A railroad company whose line of road runs through low lands, subject to overflow from streams cannot be held liable for damages because of the obstruction which its embankment opposes to the drainage of the flood and surface water, when no streams are obstructed and it is not shown that its road was improperly constructed for railroad purposes, *such obstruction being an incident to the use of its property.*" The court of Wisconsin in the case of *O'Conner* v. *Fond Du Lac etc. Ry. Co.*, 38 Am. Rep. 753, states the principle as follows: "A railway company, in the construction of its road, is not liable in damages for filling up an artificial ditch by which surface water was drained from land of an adjacent owner into a stream." And

likewise in *Petticolas* v. *Evansville* (Wis.), 3 Am. Rep. 50. In *Lawton* v. *Ry. Co.* (S. C.), 22 S. E. 517, it was held that no action would lie for damming up surface water by a railroad company. And in *Baltzeger* v. *Columbia Midland Ry. Co.* (S. C.), 32 S. E. 358, it is said, "A land owner may repel surface water by an obstruction without incurring liability for damages to an adjoining proprietor, unless a nuisance *per se* is created by the accumulation of the water."

The common law doctrine both as to individuals and corporations is treated at length in *Johnson* v. *Chicago etc. R. R. Co.* (Wis.), 27 Am. Rep. 77; *Goodale* v. *Tuttle,* 29 N. Y. 459; and there is some discussion in Angell on Watercourses (7th Ed.) Chap. IV. Virginia, after some doubt, has adopted the common law rule. See *N. & W. Ry. Co.* v. *Carter,* 91 Va. 587.

This view seems to the writer to be best founded on reason and principle, and one whose effect is certainly calculated to inure to the benefit and profit of landowners, when surface water becomes the subject of controversy. All legal rules are to be so formulated and applied as to work the greatest happiness and cause the least inconvenience to the people who are to be affected by them. It is evident that it is to the best interest of agriculture that the owner of land should be untrammeled and unhampered in the use and improvement of it. The common law doctrine will work more satisfactorily to the advantage of all parties. It permits more readily the improvement of property; it encourages and fosters the art of husbandry; its effect is to induce the erection of buildings and other structures, beneficial not only to the owner thereof, but to the whole community. As to the principle *sic utere tuo ut alienum non laedas,* we conceive that this means only that the owner of land shall so use and occupy it as not to interfere with the *legal rights* of others. Can it be considered a *legal right* for one to maintain his property in such a manner as to injure the property of others? And this is the condition that exists when there is created by the law a servitude, to receive the flow of surface water, on one estate in favor of another. Is it a *legal right* for one man to prosper, perhaps, or at least to regulate his property affairs at the cost of another entitled to equal privileges? We think not, and cannot perceive how the above principle, *sic utere,* etc., is violated in enforcing the common law rule. In *Gannon* v. *Hargodon,*

supra, it is said, "*Cujus est solum, ejus est usque ad caelum,* is recognized as a general rule applicable to the use and enjoyment of real property; and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any consideration of injury to other land, which may be occasioned by the flow of mere surface water, or consequences of the lawful appropriation of land by its owner to a particular use or mode of enjoyment."

There is a stricter rule of liability applied to municipal corporations than to individuals and private corporations, they being held liable for the negligent and careless performance of their rights and duties by which the flow of surface water is unnecessarily increased or impeded. It is settled that at common law no liability would attach when the act complained of was done pursuant to legislative authority, when reasonable care and skill has been used in performing the act, although the same act would be actionable if done without special authority. 2 Dillon Munic. Corp. 987-988; *Chalkley* v. *Richmond,* 88 Va. 403; *Harrisonburg* v. *Roller,* 97 Va. 582. But it is equally well settled that the corporation is liable if it fails to exercise due care in the execution of the work. *Goddard* v. *Inhabitants,* 30 Am. Rep. 389; *Pack* v. *Seattle,* 34 Am. St. Rep. 809. In *Hudson* v. *Hoyt* (Wis.), cited in note to 2 Dillon Munic. Corp. p. 933, it is said that when passage of surface water through a ravine or otherwise is obstructed by the corporation in the exercise of its power to grade and improve streets, the adjacent landowner, injured in consequence, has no action against the municipality. The rule as to negligence is laid down in *Barton* v. *Syracuse,* 36 N. Y. 54, "If a sewer is negligently permitted to become obstructed or filled up so that it causes water to back-flow into a cellar connected with it, there is a liability therefor on the part of the municipal corporation having control of it." In *Smith* v. *Alexandria,* 33 Gratt. 208, one of the early Virginia cases, it is held that a municipal corporation is not liable when it causes injury in the improvement of its streets, if it used proper care and means in the performance of the work. The court says, in *Powell* v. *Wytheville,* 95 Va. 73: "A municipal corporation is not liable for consequential damages from improving its streets, when it exercises reasonable care and skill in the performance of the work which it is authorized to do, and no part of the lands of others

is actually taken. But in the absence of such care and skill, it is liable for all damages not necessarily incident to the work, and which are chargeable to the unskillful and improper manner of executing it." To the same effect, *Harrisonburg* v. *Roller, supra,* and *Detroit* v. *Cory,* 9 Mich. 165.

Of course, when there is a constitutional provision against taking or *damaging* private property for public use, the corporation would be liable, no matter how it performed the work. Under the usual constitutional provision against taking private property for public use it is *damnum absque injuria* if a municipal corporation, in the performance of its rights and duties, allowed by statute or charter, obstructs surface water causing injury to landowners; *provided,* such work is not done negligently or carelessly or without the use of proper means. The liability of municipalities in this respect is summed up in 2 Dillon Munic. Corp. sec. 802: "The principle, indeed, is a general one, that while there is no implied liability for damages necessarily occasioned by the construction of any municipal improvement authorized by law, yet if the work thus authorized be not executed in a proper or skillful manner, there will arise a common law liability for all damages not necessarily incident to the work, and which are chargeable to the improper or unskillful manner of executing it."

We perceive no real distinction between the liability of individuals or municipal corporations for obstructing or hindering the passage of surface water. The difference, if there be any, is in degree only; the municipal corporation being held to the same liability in a somewhat stricter manner than the individual. The reason for this higher degree of liability seems to be based upon the broad principles of public policy. The city alone has the power to control and keep in order streets, sewers, embankments, etc., and it should govern the construction and improvement of these so as to work for the best interests of the inhabitants. When a municipality in the performance of powers authorized causes injury to individuals, which injury is the necessary result of the carrying out of such powers, it is clear that it should not be held liable in damages; for the benefits and conveniences of the work thus executed inures to all alike — another illustration of the law of society that some must relinquish their rights when it becomes absolutely necessary for the welfare of the whole. On the contrary,

when the damage caused is not incident to the performance of duties and rights; or when the work is done in a negligent, careless or wanton manner, or is done with improper means, it is equally just that a full compensation should be made to the one who suffers the injury. *Damnum absque injuria* is a principle that does not govern absolutely the liability of municipal corporations in the execution of work authorized by statute or charter, as seen from the authority above referred to.

NOTE.—A different view from that given in the article above is set out in 3 Farnham on Waters, 2554 *et seq.* The author says: "With the exception of a few states, the principal rules with respect to drainage of surface water from the land are uniform and well settled. There is no right on the part of one landowner to drain the water from his land over that of his neighbor without the latter's consent. This rule prevents the gathering of water into a body and casting it on the lower owner, or collecting it in artificial ditches for that purpose, or changing the course of drainage. There is one point, however, at which there is a sharp conflict between the courts of the respective states, and that is upon the question whether the natural depressions along which the water has been accustomed to flow must be kept open to allow the continued flow of the water, or any landowner may ignore and close them at his pleasure. Under the civil law and the English common law, so far as we have any trace of it, the rule is that the natural drain must be kept open to carry the water into the streams, and that the lower estate is subject to a natural servitude for that purpose. In comparatively recent times, however, a doctrine has grown up, the origin of which cannot be definitely traced, but which seems to have originated in Massachusetts and New Jersey, to the effect that there is no such servitude of drainage, and that the owner of the lower estate may close the drains at his pleasure. This doctrine has been referred to as the common-law and common-enemy doctrine, and it has been said that under it anyone had a right to fight surface water as his interest demanded. The doctrine as thus stated is not the doctrine of the English common law and is the doctrine of very few American states. In fact many courts which have assumed to adopt it have not in fact done so. With the possible exception of the few states referred to, the common-enemy doctrine is nowhere in force."

After sixty pages of minute examination of authorities, the author summarizes his results as follows (p. 2618): "From the foregoing decisions, it is apparent that the general rules with respect to surface water are plain, uniform, equitable and easily understood, and that the courts have for the most part adhered to them; but that a few courts have failed to appreciate or recognize the principles on which they are founded, or even their true purport or application, and have, partly by their *dicta*, but to

some extent by decisions based upon such *dicta*, thrown some confusion into the law upon the subject. The law, as gathered from the trend of the decisions, and the thread running quite consistently through them all, may be stated as follows: With respect to water as it falls from the clouds the burden must rest where it falls so long as the water remains in a diffused state, without being gathered into any channel. In such condition the water will, ordinarily, do no particular harm, and if it is necessary to obtain drainage for it, resort must be had to the state by means of public drainage proceedings. While the water is in that condition any landowner may make such improvement in his property as he chooses. He may build upon and change the surface at pleasure, without liability for the incidental effect upon adjoining property. He cannot, however, by artificial means gather the water upon his property together and throw it upon the property of his neighbor, whether the grade of the latter's land is lower or higher than his. The property of the neighbor is under no servitude to furnish artificial drainage for his property. Furthermore the upper owner cannot change the course in which the water flows over the surface of his property, nor can he render his surface impervious so as to collect the water at his boundry and cast it on to his neighbor, nor can he do anything to relieve himself of the water at his neighbor's expense. And so long as the water is spread out the neighbor is under no obligation to permit the water to flow upon his property from higher ground although the grade is such as to make the flow from one parcel to the other a natural one. If, however, the water be gathered into a stream by natural means and has either formed for itself a channel, or has sought one formed by nature, so that such channel is the natural means of escape for the water, the lower owner cannot obstruct the channel, but must permit the flow to continue, and if he wishes to improve his property, he must provide for the continued flow of the water across it. This latter rule is subject to the exception that when there are artificial drains into which the water can be reasonably turned, the servitude no longer exists; there being no further need for the natural drain, the rule which recognizes it ceases when the reason for the rule under which it was established ceases."

In *N. & W. Ry. Co.* v. *Carter*, 91 Va. 587, 592, 22 S. E. 517, it is said that the common-enemy doctrine holds in this state, modified by the maxim "*sic utere*," etc., and with certain exceptions, among which are (1) that the owner of land cannot collect the water into an artificial channel or volume and pour it upon the land of another to his injury; and (2) that the owner of the land cannot interfere with the flow of surface water in a natural channel or watercourse. C. B. G.